SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 874.

ELMORE D. DIER, HARRY J. LAWRENCE, JR., AND LAWRENCE STARR, &C., ET AL., APPELLANTS,

against

JOAB H. BANTON, DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, AND MANFRED W. EHRICH, TRUSTEE IN BANKRUPTCY.

MEMORANDUM FOR MANFRED W. EHRICH, TRUSTEE IN BANKRUPTCY, IN OPPOSITION TO MOTION OF APPELLANTS.

This appeal is brought here direct from the District Court of the United States for the Southern District of New York, being allowed by order of Hon. Learned Hand, district judge (fol. 25). It seeks to bring up for review the order denying the motion of Elmore D. Dier and others, the bankrupts, for an injunction restraining the receiver (now the trustee) in bankruptcy from delivering the books, records and documents

of the said bankrupts to the District Attorney of the County of New York to be used in a criminal proceeding pending against the said bankrupts upon the ground that their use would violate the constitutional privileges of the bankrupts under articles IV and V of the United States Constitution (fols. 17-18). The order also directed that said books be delivered to the District Attorney for use in said criminal proceeding if and when appropriate process for that purpose was served (fol. 18).

The assignment of errors (fols. 19-20) presents no question except with respect to the alleged constitutional privilege of the bankrupts not to have such books, records, and documents used against them in any criminal proceeding.

The order is manifestly not appealable to this Court under the statutes governing such appeals for the following reasons:

1. No appeal lies in a bankruptcy matter direct from the District Court to this Court. Under the act of 1915 as amended, final appellate jurisdiction in all bankruptcy matters is vested in the Circuit Court of Appeals unless brought here by certiorari by this Court.

2. The bankrupts' privilege ended upon the possession of the books, records and documents being delivered by them to the receiver in bankruptcy (now the trustee), and therefore no constitutional question is involved herein, which alone would be reviewable by this Court in any event.

The lack of jurisdiction being here called to the attention of the Court, the appeal should be dismissed. Certainly no further stay should be granted, pending the hearing of the appeal in this Court.

Point I.

The order is not appealable to this court under the statutes governing appeals in bankruptcy matters.

The Act of January 28, 1915 (Chapter 22, Section 4) as amended by the Act of September 6, 1916 (Chapter 448, Section 3) provides that:

> "Judgments or decrees of the circuit court of appeals in all proceedings arising under 'An act to establish a uniform system of bankruptcy throughout the United States,' approved July 1st, eighteen hundred and ninety-eight, and in all controversies arising in such proceedings and causes; * * *; and, also in all causes arising under any amendment or supplement to any one of the aforementioned acts which has been heretofore or may be hereafter enacted, shall be final, save only that it shall be competent for the supreme court to require by certiorari, upon petition of any party thereto, that the proceeding, case, or controversy be certified to it for review and determination, with the same power and authority and with like effect as if taken to that court by appeal or writ of error."

This is a comprehensive provision which limits appellate jurisdiction of all bankruptcy matters to the circuit courts of appeal except where this court requires the matter to be certified to it by certiorari.

All the provisions theretofore in force of the Bankruptcy Act and of the Judicial Code relative to appeals to this court are superseded by this provision.

The appellant presumably relies upon section 239 of the Judicial Code (Act of March 3, 1911), as authorizing this appeal, contending that it involves the application of the Constitution of the United States. As to bankruptcy proceedings and all controversies therein, the above quoted Act of 1915 supersedes section 239 of the Judicial Code.

The Act of 1915 is sweeping in its provisions and makes all judgments and decrees of the Circuit Court of Appeals in all proceedings and causes arising under the Bankruptcy Act final not only in bankruptcy proceedings proper, but in all collateral controversies arising in the course of the proceedings as well. (Brandenburg on Bankruptcy, Fourth Edition, page 1244.)

Point II.

The order is not appealable because no constitutional question is involved herein. The ruling of the learned district court that the constitutional privilege ended upon the surrender by the bankrupts of their books to the receiver is manifestly correct.

The opinion of the learned district judge (fols. 12-13) refers to the decision of this court in *Johnson vs. U. S.*, 228 U. S., 457, in which it was directly held that where the bankrupt had without reservation surrendered his books to a trustee, his constitutional privilege was ended thereby, the court stating:

> "A party is privileged from producing the evidence, but not from its production."

That case is, of course, conclusive unless a distinction arises from the fact that the books were delivered to the receiver in bankruptcy by the bankrupts without reservation, and not to a trustee, as in the Johnson case. The court below held that this fact created no distinction, that the test was whether the surrender was resisted when the receiver demanded possession and that there was no such resistance. No claim was made by the appellants that they in any manner reserved their rights or made any resistance upon surrendering the books to the receiver. The privilege does not depend in any respect upon the title of the person to whom the bankrupts surrendered the books. Even had they surrendered them to some third party having nothing to do with the bankruptcy proceeding, they would lose their privilege; for as the court below remarked:

> "The possessor alone can produce, not the owner, and the privilege protects only against such compulsion."

The cases of *Boyd vs. U. S.*, 116 U. S., 616; *Weeks vs. U. S.*, 232 U. S., 383, and *Silverthorne Lumber Co. vs. U. S.*, 251 U. S., 385, are clearly distinguished in the opinion below (fol. 13) upon the ground that in each of those cases the possessor of the evidence was forced to produce it by illegal means.

In *Gouled vs. U. S.*, 255 U. S., 298, possession of the evidence was procured by fraud.

Arndstein vs. McCarthy, 254 U. S., 71, had nothing whatever to do with the production of books, records and documents, but related to an attempt to compel the bankrupt to testify orally to matters which might tend to incriminate him.

It thus appears that no question of constitutional privilege is involved herein and that therefore the order is not appealable.

The motion for a stay should be denied and the appeal dismissed.

Respectfully submitted,

SAUL S. MYERS,
ARTHUR GARFIELD HAYS,
Of Counsel for the Trustee in Bankruptcy.

Dated New York, May 22, 1922.

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Supreme Court of the United States.

IN THE MATTER
OF
ELMORE D. DIER, HARRY J. LAWRENCE, JR., LAWRENCE STARR, individually and as co-partners doing business under the firm name of E. D. DIER & Co., and E. D. DIER & Co.,
Alleged Bankrupts,
Appellants.

October Term, 1921.
No. [redacted]320

MEMORANDUM FOR APPELLANTS ON MOTION TO ADVANCE CAUSE AND FOR STAY PENDING DECISION.

Statement of Procedure.

On January 14th, 1922, a petition in involuntary bankruptcy was filed against E. D. Dier & Co., a co-partnership, appellants here.

On January 16th, 1922, the United States District Court for the Southern District of New York appointed a Receiver in Bankruptcy and directed him to take possession of all books, records, documents,

&c. of E. D. Dier & Co., and such books, records and documents were ordered to be turned over to the Receiver. (See Order Appointing Receiver, fols. 1-4.)

Acting under such order of appointment, the Receiver took physical possession of the books, records and papers of the alleged bankrupts.

While the Receiver had possession of such books and records, and before the appointment of a Trustee in Bankruptcy, the District Attorney of the County of New York issued a subpœna to the Receiver, in substance, directing him to turn over the books and records to the District Attorney for use in a criminal proceeding against the alleged bankrupts. The alleged bankrupts immediately, on February 16th, 1922, presented a petition to the District Court of the United States for the Southern District of New York, praying for an order to show cause why the Receiver should not be enjoined and restrained from delivering over the books and records to the District Attorney upon the ground that such delivery would be violative of the Constitutional privileges of the petitioners, in accordance with Amendments 4 and 5 to the United States Constitution, in that it would, in effect, be compelling the alleged bankrupts to be witnesses against themselves. (See Petition, fols. 6-11.)

The order to show cause was granted and directed to Hon. Joab H. Banton, District Attorney of New York County, and Manfred W. Ehrich, as Receiver of the alleged bankrupts, and was returnable on February 20th, 1922. The Court also granted a stay and directed the Receiver to retain possession of the books, records, documents and papers of the alleged bankrupts until the further order of the Court. (See Order to Show Cause,

fols. 4-6.) After argument, with decision reserved, Hon. Learned Hand, District Judge for the Southern District of New York, made an order discharging the rule, the order containing the following clause:

> "FURTHER ORDERED that the Receiver herein and said alleged bankrupts deliver over said books, records and documents of said E. D. Dier and E. D. Dier & Company to the District Attorney of the County of New York, for use in said criminal proceedings against said Petitioners, if and when appropriate process for that purpose is duly served." (See Order, fols. 17-19.)

The Court filed an opinion which is printed in the record. (See Opinion, fols. 11-14.)

E. D. Dier & Co. thereupon applied for leave to appeal to this Court upon assignment of errors. (See Petition, fols. 22-25; see Assignment of Errors, fols. 19-22.)

The appeal was allowed on April 10th, 1922. (See Order, fols. 25-26.)

The record was certified and filed in this Court on April 13th, 1922.

The Court, by order, continued the stay up to and including May 16th, 1922.

Appellants' motion to advance the cause for argument and for the continuance of the stay *pendente* was presented to this Court on May 15th, 1922.

ARGUMENT.

I.

The possession of the books, records and documents of the alleged bankrupts by the Receiver was, in legal effect, the possession of the bankrupts.

In the preface to the opinion by Judge Hand, it is stated:

> "The alleged bankrupts without objection surrendered possession of the books to the Receiver, who now holds them."

It will be noted that the Petition in Bankruptcy was an involuntary proceeding instituted by creditors and that when the Receiver, upon appointment, took possession of the books, records and documents of the alleged bankrupts, he did so under the specific order of the Court. The Bankrupts did not surrender possession. The Receiver *took* possession, as the Court had instructed him to do. This was not such a delivery of the books by the Bankrupts as constituted a waiver of their Constitutional rights. If they had interfered with the Receiver in obtaining the possession of the books, it would have constituted a contempt of court. After the Court had made its order directing the Receiver to take possession of the books, the Bankrupts had no alternative but to permit the Receiver to take such possession in order to facilitate the administration in bankruptcy.

See *In re Harris*, 164 Fed. Rep. 292, (affirmed in

this Court, In *Matter of Harris*, 221 U. S. 274), wherein the syllabus, in part, reads:

> "A bankrupt is not deprived of his constitutional right not to testify against himself by an order requiring him to surrender his books to the duly authorized Receiver."

The particular attention of the Court is called to the fact that in the Harris case the original order directing the delivery of the books to the Receiver definitely protected the Bankrupts against the use of the books in criminal prosecutions and gave an opportunity for the Constitutional privilege to be asserted. In the case at bar, the order directing the delivery of the books to the Receiver contains no protective clause whatever so that when the District Attorney sought to reach the books by subpœna in the hands of the Receiver, the Bankrupts asserted their Constitutional rights at the most effective moment.

The Receiver, under the order of the Court, did not take title to the property of the alleged bankrupts or to the books. He was merely a custodian and his possession was, in legal effect, the possession of the bankrupts. When, therefore, the subpœna directed the Receiver to turn over the books to the District Attorney, it, in legal effect, directed the Bankrupts to so turn over their books, records and documents, which was violative of their Constitutional rights.

II.

The bankrupts' objection to the use of the books in a criminal proceeding was made in due time.

Immediately upon the demand by the District Attorney upon the Receiver for the delivery of the books and the service of the subpœna upon the Receiver, the alleged Bankrupts instituted this proceeding by petition to restrain the delivery of such documents and for the assertion of their Constitutional rights. This was the earliest moment at which the claim of privilege could have been effectively asserted. The Bankrupts could not have interfered with the Receiver's taking possession of the books without subjecting themselves to punishment for contempt of Court. Judge Hand, in his opinion, states:

> "The test, I take it, is whether the surrender was resisted when the Receiver demanded possession."

In the case at Bar, there was no surrender of the books, &c. The Receiver simply took possession under the order appointing him. If we are right in our contention that the Receiver took no title and was the mere legal custodian of the property, then there could have been no waiver of Constitutional rights under the circumstances of this case. The alleged Bankrupts interposed their objection by application to the Court prior to the appointment of a trustee in bankruptcy and before title to any of their property had passed. Let us assume that the petition in bankruptcy had been dismissed, then the Receivership would have fallen with it and the Bankrupts would again have been entitled to possession of their books. Could it be held that be-

cause the books had temporarily passed into the legal possession of the Receiver, that their Constitutional rights with reference to criminal proceedings had been waived?

In *Johnson* v. *U. S.*, 228 U. S. 457, cited by Judge Hand, a very different state of facts was presented. There a Trustee in Bankruptcy had been appointed and the Bankrupt surrendered his books to the Trustee without reservation. This Court held, in substance, that when possession and *title* passed without protest from the bankrupt his privilege ended. In the case at bar, the Court will note that title had not passed before the assertion of the privilege, as the books were only held in the legal possession of the Receiver as Custodian.

See also:

Amos v. *U. S.*, 255 U. S. 313;
Flagg v. *U. S.*, 233 Fed. 481;
Arnstein v. *McCarthy*, 254 U. S. 71.

III.

The stay should be continued pending the decision of this Court.

The question of law presented by this appeal has apparently not been directly decided by this Court in any reported decision. If the stay is not continued pending argument of the appeal and decision, the books will be delivered to the District Attorney for use in a contemplated criminal investigation, and there could be no subsequent relief to the Appellants. On the other hand, no harm can come from continuing the stay until the question is decided, as there is no question of the Statute of Limitations being involved relative to the commis-